IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. SHANNON ANDRA JOHNSON, Appellant.	))))))))))	DIVISION ONE No. 63163-2-I UNPUBLISHED OPINION FILED: July 19, 2010

Dwyer, C.J. — Shannon Johnson appeals from his felony convictions for two counts of domestic violence violation of a court order. Pursuant to statute, the court order violations were felony offenses because Johnson had at least two previous convictions for violating a court order. Johnson raises three primary issues on appeal. First, whether the evidence of his prior convictions was sufficient to support the felony convictions. Second, whether the charging document filed herein was deficient because it did not identify his previous convictions with particularity. Third, whether numerous statements admitted at trial were inadmissible hearsay or were admitted in violation of his right to confrontation. Finding no error, we affirm.

I

On December 15, 2006, the King County Superior Court issued a

domestic violence no-contact order pursuant to RCW 10.99.050 as a condition of Shannon Johnson's sentence upon a conviction for a domestic violence offense. The 2006 no-contact order prohibited Johnson from contacting his girlfriend, Tralenea Givens, until December 15, 2011.

Despite the court order, Johnson continued to have contact with Givens. Two separate incidents, both occurring in 2008, resulted in Johnson being twice charged with domestic violence felony violation of a no-contact order.

By amended information, the State charged Johnson with two counts of "domestic violence felony violation of a court order," in violation of RCW 26.50.110(1) and (5).[1] The charging document specifically accused Johnson of violating the 2006 court order protecting Givens on September 15, 2008, and

[1] RCW 26.50.110 establishes penalties for violation of court orders issued pursuant to certain statutes. It reads, in relevant part:

> (1)(a) Whenever an order is granted under this chapter, chapter 7.90, 9.94A, 10.99, 26.09, 26.10, 26.26, or 74.34 RCW, or there is a valid foreign protection order as defined in RCW 26.52.020, and the respondent or person to be restrained knows of the order, a violation of any of the following provisions of the order is a gross misdemeanor, except as provided in subsections (4) and (5) of this section:
>
> (i) The restraint provisions prohibiting acts or threats of violence against, or stalking of, a protected party, or restraint provisions prohibiting contact with a protected party;
>
> (ii) A provision excluding the person from a residence, workplace, school, or day care;
>
> (iii) A provision prohibiting a person from knowingly coming within, or knowingly remaining within, a specified distance of a location . . . .
>
> . . .
>
> (5) A violation of a court order issued under this chapter, chapter 7.90, 9.94A, 10.99, 26.09, 26.10, 26.26, or 74.34 RCW, or of a valid foreign protection order as defined in RCW 26.52.020, is a class C felony if the offender has at least two previous convictions for violating the provisions of an order issued under this chapter, chapter 7.90, 9.94A, 10.99, 26.09, 26.10, 26.26, or 74.34 RCW, or a valid foreign protection order as defined in RCW 26.52.020. The previous convictions may involve the same victim or other victims specifically protected by the orders the offender violated.

again on November 7, 2008. The information also generally alleged that Johnson, at the time of the offenses, had at least two prior qualifying convictions.[2]

The first incident, on September 15, 2008, began when Johnson picked up Givens and her fifteen-year-old son, Jelani Givens-Jackson,[3] in Seattle in order to drive Jelani to his school in Burien. The recordings of 911 calls—one involving Jelani and two involving Givens—reveal that Johnson became angry at Givens during the drive, so he stopped the car quickly, causing Givens' head to hit the window. Johnson then assaulted Givens, trying to pull her out of the car, at which point Jelani exited the car to help Givens. Johnson subsequently drove off, leaving Jelani on the side of the road. Shortly thereafter, Johnson pushed Givens out of the car in a different location. The recording of Jelani's 911 call

---

[2] The amended information states:

> COUNT I
>
> I, Daniel T. Satterberg, Prosecuting Attorney for King County in the name and by the authority of the State of Washington, do accuse SHANNON ANDRA JOHNSON of the crime of **Domestic Violence Felony Violation of a Court Order**, committed as follows:
>
> That the defendant SHANNON ANDRA JOHNSON in King County, Washington, on or about September 15, 2008, did know of and willfully violate the terms of a court order issued on December 15, 2006, by the King County Superior Court pursuant to RCW chapter 10.99, for the protection of Tralenea Givens, and at the time of the violation having at least two prior convictions for violating the provisions of an order issued under RCW chapter 10.99, 26.50, 26.09, 26.10, 26.26 or 74.34, or under a valid foreign protection order as defined in RCW 26.52.020;
>
> Contrary to RCW 26.50.110(1), (5), and against the peace and dignity of the State of Washington.

Count II charges Johnson with the same crime, alleging that Johnson committed a similar violation on November 7, 2008.

[3] We refer to Jelani Givens-Jackson as "Jelani" for ease of reference. No disrespect is intended.

reveals that he was concerned for his mother's welfare and was unsure as to where he had been abandoned.[4] The recordings of Givens' 911 calls reveal that Givens was frantic, bleeding, and concerned about where her son was located. However, Givens declined the operator's offer of medical assistance. She identified herself as Tralenea Givens and identified Johnson as her assailant.[5]

---

[4] The 911 recording of Jelani's call contains the following exchange:

CALLER: Hello.
911: Hello this is Seattle Police you were uh call, trying to call 911.
CALLER: Uh the dude just drove off with my mom, dog.
911: What's going on?
CALLER: He left, he just drove off with my mom.
911: Who drove with your mom?
CALLER: The dude named Shannon.
911: What's that?
CALLER: He just, he just left me.
911: Okay this is a different operator than you were on before with this, this is Seattle Police Department not the State Patrol they were transfering you to us and uh you got disconnected somehow. So what's, what's going on there?
CALLER: Uh my mom was gonna take me to school and then there, this dude wouldn't let her go. So the dude get mad then he was all telling her to be quiet so he stopped the car too quick, made my mom's head hit the window. So my mom got mad and then like he started trying to pull her out the, out of the car.

[5] The 911 recording of Givens' two calls contain the following exchanges:

CALLER: (Unintelligible)…
911: Seattle Police and Fire.
CALLER: The license plate is 274…
911: Where are you?
CALLER: …SUR.
911: Ma'am where are you?
CALLER: In the street, my boyfriend just threw me out of the car.
911: Alright ma'am tell me where you're at? Where are you?
CALLER: 274 SUR…
911: 274? 27…
CALLER: My hand is bleeding off.
911: Okay but you're talking when I'm trying to ask you, I don't know where you're at.

…
911: Okay what happened?

At trial, Johnson objected to the admission of Givens' and Jelani's statements on both hearsay and confrontation clause grounds. The trial court overruled these objections, admitting almost all of the statements made in the 911 recordings of the three calls. The trial court found that Jelani's statements were present sense impressions and that Givens' statements were excited utterances. In addition, the trial court found that the admission of these statements did not violate the confrontation clause.

Seattle Police Officer Kyle Squires found Givens shortly after her 911 calls began. At the time the officers found her, she and Jelani had not yet been reunited and she "was very upset, crying," and "worried about her son." Givens

---

CALLER:	And he left, he was gonna take my son to school and he gets mad because he goes you didn't get me no breakfast and he decided he's gonna beat me up.
911:	And do you know this person?
CALLER:	But (untelligible) . . . he says get out of the car . . . (unintelligible) . . .
911:	Uh I can't understand you, you're getting a little too excited. Hold on, okay? You need to calm down a little bit so I can understand you. Okay, so is this a boyfriend?
CALLER:	Yep.
911:	Okay, and did he assault you?
CALLER:	Yes, he did.
911:	Do you need a medic?
CALLER:	No, I don't need a medic. My hand is bleeding but I'm just gonna wash it off.
…	
CALLER:	No—he left my son down here on the corner.
911:	Okay.
CALLER:	My son is not in the car. He—I don't know where he is—my son's not in the car.
911:	Okay what's your boyfriend's last name?
CALLER:	Shannon Johnson, his last name is J-O-H-N-S-O-N.
911:	And his first name's Shannon?
CALLER:	Shannon, S-H-A-N-N-O-N, Andre is his middle name.
911:	Okay.
CALLER:	A-N-D-R-E.
911:	What . . .
CALLER:	I have a no-contact order.

subsequently accepted the officers' offer of medical assistance for her bleeding hand. Officer Squires testified that he had no question in his mind that the woman he contacted at the scene on September 15 was Givens.

The second incident began early in the morning on November 7, 2008. Seattle Police Officer Ryan Keith investigated a stolen vehicle that was parked on the wrong side of a street and blocking a driveway. He discovered a male and a female inside. The male was identified as Johnson and the female identified herself as Latenea Givens.[6] Both were transferred to the precinct, where Officer Keith discovered that a no-contact order prohibited Johnson from contacting Tralenea Givens.

Officer Keith was concerned that the woman he had in custody was Tralenea rather than Latenea, so he investigated booking photographs to find a picture of Tralenea. Officer Keith did not look for a photograph of Latenea. He found a booking photograph of Tralenea Givens and determined that the picture matched the woman he had in custody. Officer Keith testified that "[t]here's no doubt in my mind" that the woman in the car with Johnson was Tralenea Givens. Officer Keith confronted the woman in custody with the fact that he had matched her face to a picture of Tralenea, whereupon she admitted that she was Tralenea Givens. At trial, Johnson objected on hearsay grounds to the admission of Givens' statement of identity, which the trial court overruled, finding that the statement was not offered for the truth of the matter asserted.

[6] Johnson also told Officer Keith that the woman was Latenea Givens.

Generally, a violation of a court order is charged as a gross misdemeanor crime. However, the State may elevate the charge to a felony if the defendant has two previous convictions for violation of a court order issued under particular statutes. To establish that Johnson had two previous qualifying convictions, an element of Johnson's charged crimes, the State introduced three judgment and sentence forms. The first judgment and sentence form reflected that Johnson was convicted in King County Superior Court of a felony violation of a no-contact order pursuant to RCW 26.50.110(1) and (4).[7] The second judgment and sentence form reflected that Johnson had been convicted of a "DV-VNCO" after he pled guilty in Seattle Municipal Court. The third judgment and sentence form reflected that Johnson pled guilty in Renton Municipal Court to "DV-no contact order violatio[n]." Neither of the municipal court documents states the statutory basis for the conviction.

Johnson objected to the admission of these three judgment and sentence forms on the basis of relevancy. Johnson argued that the State had failed to prove that they were qualifying convictions, meaning that the convictions were based on violations of court orders issued under one of the statutes enumerated

[7] RCW 25.50.110(4) provides:

> Any assault that is a violation of an order issued under this chapter, chapter 7.90, 9.94A, 10.99, 26.09, 26.10, 26.26, or 74.34 RCW, or of a valid foreign protection order as defined in RCW 26.52.020, and that does not amount to assault in the first or second degree under RCW 9A.36.011 or 9A.36.021 is a class C felony, and any conduct in violation of such an order that is reckless and creates a substantial risk of death or serious physical injury to another person is a class C felony.

in RCW 26.50.110(5). The trial court summarily overruled the objection and admitted the judgment and sentence forms, stating that the objection would be preserved and that a motion to dismiss would be a more appropriate time to determine whether the prior convictions were qualifying convictions. At the close of the State's case, Johnson moved to dismiss premised upon the State's alleged failure to prove that Johnson had two prior qualifying convictions. The trial court found that the prior convictions were based on violations of no-contact orders issued pursuant to one of the enumerated statutes and denied the motion.

The jury returned verdicts of guilt on the two felony counts of domestic violence violation of a court order. Johnson appeals.

II

In the trial court, Johnson both objected to the introduction of the three judgment and sentence forms and moved to dismiss the felony violation of a court order charges based upon a claim of insufficient evidence. On appeal, Johnson's claim of error is to the sufficiency of the evidence, alleging that the State did not "prove Johnson was previously convicted of two eligible violations of a no contact order."

When resolving a challenge to the sufficiency of the evidence, we ask whether, "after viewing the evidence in a light most favorable to the State, any rational trier of fact could have found the essential elements of the charged

crime beyond a reasonable doubt." State v. Rempel, 114 Wn.2d 77, 82, 785 P.2d 1134 (1990) (citing State v. Green, 94 Wn.2d 216, 221, 616 P.2d 628 (1980)). Because credibility determinations are for the trier of fact and are not subject to review, State v. Camarillo, 115 Wn.2d 60, 71, 794 P.2d 850 (1990), we defer to the trier of fact on issues of conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence. State v. Walton, 64 Wn. App. 410, 415-16, 824 P.2d 533 (1992).

Our Supreme Court has previously discussed the role of the trial court in addressing issues related to those raised in this appeal:

> [T]he "existence" of a no-contact order is an element of the crime of violating such an order. However, the "validity" of the no-contact order is a question of law appropriately within the province of the trial court to decide as part of the court's gate-keeping function. The trial judge should not permit an invalid, vague, or otherwise inapplicable no-contact order to be admitted into evidence.

State v. Miller, 156 Wn.2d 23, 24, 123 P.3d 827 (2005).

Moreover, "issues relating to the validity of a court order (such as whether the court granting the order was authorized to do so, whether the order was adequate on its face, and whether the order complied with the underlying statutes) are uniquely within the province of the court." Miller, 156 Wn.2d at 31.

> An order is not applicable to the charged crime if it is not issued by a competent court, is not statutorily sufficient, is vague or inadequate on its face, or otherwise will not support a conviction of violating the order. The court, as part of its gate-keeping function, should determine as a threshold matter whether the order alleged to be violated is applicable and will support the crime charged. Orders that are not applicable to the crime should not be admitted.

Miller, 156 Wn.2d at 31 (footnote omitted).

Following Miller, this court addressed similar issues in State v. Gray, 134 Wn. App. 547, 138 P.3d 1123 (2006), a case in which the defendant claimed that "the statutory authority for the previously-violated NCOs is an essential element of felony violation of an NCO that must be found by the jury." 134 Wn. App. at 549. This court rejected that assertion, holding that "[b]ecause the statutory authority for the previously-violated NCOs dictates whether they are admissible, it is a question of law for the court in its gatekeeping capacity, not an essential element for the jury." Gray, 134 Wn. App. at 549-50. After Miller, this court held, it was established "that the statutory authority for those NCOs is not an essential element of the crime to be decided by the jury but rather a threshold determination the court makes as part of its 'gate-keeping function' before admitting the prior convictions into evidence for the jury's consideration." Gray, 134 Wn. App. at 556. "[T]he jury found the fact necessary to elevate Gray's crime to a felony: he had two prior convictions for violating NCOs." Gray, 134 Wn. App. at 557.

At trial, Johnson objected to the admissibility of the judgment and sentence forms, contending that the State had not established that the convictions were based on violations of court orders issued pursuant to one of the statutes listed in RCW 26.50.110(5). The trial judge resolved the question through the use of deductive reasoning.

It's a domestic violence no-contact order. No-contact orders

> by definition have to arise from criminal charges. It's not like a restraining order or something else where it gets a little bit more complicated. I think I can make a pretty reasoned assessment that it had to arise in the context of a criminal prosecution. . . .
>
> When it comes to the municipal court one[s], which is Exhibit 9 [and 7], that clearly states on its face that it's a domestic violence violation of a no-contact order. Again, the mere fact that it references a domestic violence no-contact order in effect tells us that it was under a qualifying statute.

Johnson concedes that one of the prior convictions was properly proved to have been a violation of RCW 26.50.110. He contends, however, that the State did not properly prove the statutory basis for the two municipal court convictions and, thus, that insufficient evidence exists to sustain his convictions.

Johnson is wrong. The trial judge properly analyzed the jurisdiction of the municipal courts in deducing that the orders at issue must have been issued pursuant to one of the listed statutes. Johnson did not show otherwise. Had either or both of the municipal court judges acted *outside* their jurisdictional authority, Miller teaches that this would raise a question of *validity*, decided by the trial court, rather than a question of evidentiary sufficiency. Johnson did not demonstrate to the trial court that the municipal court judges acted outside their jurisdictional authority.

On appeal, Johnson does not assign error to the trial court's ruling admitting the judgment and sentence forms. Thus, there is no issue as to validity properly before us.

Evidence of the three judgments having been admitted, it is apparent that,

as in Gray, "the jury found the fact necessary to elevate [the] crime to a felony: he had two prior convictions for violating NCOs." 134 Wn. App. at 557.

The jury had before it evidence of three prior convictions: one for felony violation of a no-contact order pursuant to RCW 26.50.110(4), one for "DV-VNCO," and one for "DV-no contact order violatio[n]." Viewed in the light most favorable to the State, the jury had sufficient evidence before it to find that Johnson had at least two prior convictions for violating court orders.[8]

There was sufficient evidence admitted; Johnson's claim to the contrary fails.

III

Johnson next contends, for the first time on appeal, that the amended information was defective. This is so, Johnson contends, because the State was required to explicitly identify in the charging document the particular prior convictions that qualified him for felony prosecution, rather than generally allege that he had at least two prior qualifying convictions. We disagree.

Both the federal constitution[9] and our state constitution[10] require that a defendant be apprised of the charged offense so as to enable preparation of a

[8] This was a trial concerning allegations of domestic violence and allegations of violations of no-contact orders. We do not assume the jurors to be fools. The various designations on exhibits 7, 8, and 9 were sufficient to inform the jury of the significance of the judgments and the crimes for which guilt had been established. See, e.g., State v. Leach, 113 Wn.2d 679, 691, 782 P.2d 552 (1989) ("DWI" on a citation is sufficient to apprise an ordinary citizen of the crime charged and its elements); State v. Grant, 104 Wn. App. 715, 719-21, 17 P.3d 674 (2001) ("Driving While Intoxicated" on a citation sufficiently apprises an ordinary citizen of the charged crime and its elements).

[9] U.S. Const. amend. VI.

[10] Wash. Const. art. I, § 22.

defense. State v. Goodman, 150 Wn.2d 774, 784, 83 P.3d 410 (2004). Thus, a charging document must adequately identify the crime charged, include all statutory and nonstatutory elements of the charged offense, and allege facts that support all elements of the charged offense. State v. Kjorsvik, 117 Wn.2d 93, 97, 812 P.2d 86 (1991); State v. Leach, 113 Wn.2d 679, 689, 782 P.2d 552 (1989).

Where a defendant challenges the sufficiency of the charging document for the first time on appeal, we construe the document liberally in favor of validity. Goodman, 150 Wn.2d at 787. "Under this rule of liberal construction, even if there is an apparently missing element, it may be able to be fairly implied from language within the charging document." Kjorsvik, 117 Wn.2d at 104. In order to evaluate the language of the charging document using this standard, we conduct a two-part inquiry: "(1) do the necessary facts appear in any form, or by fair construction can they be found, in the charging document; and, if so, (2) can the defendant show that he or she was nonetheless actually prejudiced by the inartful language which caused a lack of notice?" Kjorsvik, 117 Wn.2d at 105-06. "Words in a charging document are read as a whole, construed according to common sense, and include facts which are necessarily implied." Kjorsvik, 117 Wn.2d at 109.

"[I]t is sufficient to charge in the language of a statute *if* the statute defines the offense with certainty." Kjorsvik, 117 Wn.2d at 99. However, when the

charged offense is a violation of a no-contact order, charging only in the general language of the statute without including any specific facts related to the conduct giving rise to the charge is insufficient to apprise the defendant of the charged offense because the offense of violation of a domestic violence no-contact order necessarily involves a particular court order and a particular person protected by the order. City of Seattle v. Termain, 124 Wn. App. 798, 805, 103 P.3d 209 (2004). Hence, "identification of the specific no-contact order, the issuance date from a specific court, the name of the protected person, or sufficient other facts must be included in some manner" in the charging document. Termain, 124 Wn. App. at 805.

The amended information filed herein was sufficient to apprise Johnson of the crimes with which he was charged. It adequately identified the specific charged offenses by accusing Johnson of having twice committed "Domestic Violence Felony Violation of a Court Order" and by citing to RCW 26.50.110(1) and (5) as the statutory provisions that Johnson had violated. It also included all of the statutory and nonstatutory elements of the charged offenses and contained factual allegations in support of all of the elements of the charged offenses.

The elements of Johnson's charged felony offenses are a violation of a court order issued under particular statutes and the existence of two previous qualifying convictions at the time of the charged violation. RCW 26.50.110(5).

As required by Termain, the amended information herein specifically alleged that Johnson violated the 2006 no-contact order protecting Givens on both September 15, 2008, and November 7, 2008, thus apprising him of the specific order he was alleged to have violated and the conduct that constituted the alleged violations.

Further, the amended information alleged, by reciting the language of RCW 26.50.110(5), that Johnson had at least two previous convictions of violating court orders issued under particular statutes. In alleging that an individual has at least two previous convictions qualifying him or her for conviction of felony violation of a no-contact order pursuant to RCW 26.50.110(5), recitation of the statutory language is sufficient to apprise the defendant of the charged offense. This is so because, other than the statutory basis and the applicability of an offender's previous convictions to the felony violation charge, the specific circumstances surrounding such previous convictions are immaterial to establishing the element essential to the charged felony offense. By reciting the statutory language with respect to this particular element of the charged offense, the amended information apprised Johnson of the crime he was alleged to have committed. Cf. Termain, 124 Wn. App. at 806. It notified him that the State was alleging that, in addition to the current violations of a court order for which he was being charged, he had at least two previous convictions for violating court orders issued under specific statutes.

Therefore, the statements contained in the amended information herein filed against Johnson constitute factual allegations supporting every element of the charged offenses.

Despite his arguments to the contrary, Johnson has not established that he suffered any prejudice as a result of the general allegation contained in the amended information that he had at least two prior qualifying convictions. The charging document notified Johnson that he faced felony prosecutions based on his criminal history. Johnson could have sought clarification as to which aspects of his criminal history qualified him for a felony prosecution by requesting a bill of particulars. See State v. Holt, 104 Wn.2d 315, 320, 704 P.2d 1189 (1985). A bill of particulars functions "to amplify or clarify particular matters essential to the defense." Holt, 104 Wn.2d at 321. Where a charging document alleges facts sufficient to establish the elements of the charged offense, "but is vague as to some other matter significant to the defense, a bill of particulars is capable of correcting that defect . . . [and] a defendant is not entitled to challenge the information on appeal if he failed to request the bill of particulars at an earlier time." Holt, 104 Wn.2d at 320. Johnson did not request a bill of particulars. In addition, prior to trial, the State provided Johnson with copies of the judgment and sentence forms that it planned to introduce at trial to establish his prior convictions.

Accordingly, we conclude that the amended information sufficiently

apprised Johnson of the charged offenses so as to allow him to prepare a defense.

IV

Johnson next contends that the admission into evidence of the recordings of Givens' 911 calls violated his right to confrontation under the Sixth Amendment. We disagree.

We review de novo alleged confrontation clause violations. State v. Kronich, 160 Wn.2d 893, 901, 161 P.3d 982 (2007). The Sixth Amendment guarantees criminal defendants the right to be confronted with the witnesses against them. U.S. Const. amend. VI.[11] However, the admission of nontestimonial out-of-court statements does not violate the Sixth Amendment. State v. Alvarez-Abrego, 154 Wn. App. 351, 362–63, 225 P.3d 396 (2010) (citing Davis v. Washington, 547 U.S. 813, 821, 126 S. Ct. 2266, 165 L. Ed. 2d 224 (2006)). "[W]hether statements made in 911 calls are testimonial must be evaluated on a case-by-case basis." State v. Saunders, 132 Wn. App. 592, 602, 132 P.3d 743 (2006).

"Testimony" is typically defined as "'[a] solemn declaration or affirmation made for the purpose of establishing or proving some fact.'" Crawford v. Washington, 541 U.S. 36, 51, 124 S. Ct. 1354, 158 L. Ed. 2d. 177 (2004) (alteration in original) (quoting 2 N. Webster, An American Dictionary of the

[11] The Sixth Amendment's confrontation clause provides: "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him. . . ." U.S. Const. amend. VI. This right is made binding on the states through the Fourteenth Amendment. Pointer v. Texas, 380 U.S. 400, 403, 85 S. Ct. 1065, 13 L. Ed. 2d 923 (1965).

English Language (1828)). In Crawford, the United States Supreme Court expressly declined to offer a comprehensive definition of "testimonial" but declared that "[w]hatever else the term covers, it applies at a minimum to prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and to police interrogations." 541 U.S. at 68.

Subsequently, in Davis, the United States Supreme Court specifically addressed whether statements contained within a 911 call are testimonial. The Court held:

> Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution.

Davis, 547 U.S. at 822. The Court further noted that 911 calls are ordinarily designed to describe current circumstances requiring police assistance rather than to establish or prove past facts for prosecution purposes. Davis, 547 U.S. at 827. "Thus, 911 calls are not generally testimonial." State v. Williams, 136 Wn. App. 486, 503, 150 P.3d 111 (2007). Such calls are generally not considered testimonial because "[n]o 'witness' goes into court to proclaim an emergency and seek help." Davis, 547 U.S. at 828.

In Davis, the Court held that the complainant's statements to the 911 operator regarding her husband's assault against her were not testimonial.[12]

547 U.S. at 827. The Court so held because the complainant was speaking of events as they were happening, any reasonable listener would find that she was facing an ongoing emergency, she was plainly calling for help, the nature of what was asked and answered was such that the elicited statements were necessary to be able to *resolve* the present emergency, rather than simply to learn what had happened in the past, and her "frantic answers were provided over the phone, in an environment that was not tranquil, or even (as far as any reasonable 911 operator could make out) safe." Davis, 547 U.S. at 827. The Court explained that even the 911 operator's efforts to establish the identity and location of the assailant were intended to discover information related to an

---

[12] The transcript of the Davis complainant's 911 call reveals the following exchange:

911 Operator: Hello.
Complainant: Hello.
911 Operator: What's going on?
Complainant: He's here jumpin' on me again.
911 Operator: Okay. Listen to me carefully. Are you in a house or an apartment?
Complainant: I'm in a house.
911 Operator: Are there any weapons?
Complainant: No. He's usin' his fists.
911 Operator: Okay. Has he been drinking?
Complainant: No.
911 Operator: Okay, sweetie. I've got help started. Stay on the line with me, okay?
Complainant: I'm on the line.
911 Operator: Listen to me carefully. Do you know his last name?
Complainant: It's Davis.
911 Operator: Davis? Okay, what's his first name?
Complainant: Adrian
911 Operator: What is it?
Complainant: Adrian.
911 Operator: Adrian?
Complainant: Yeah.
911 Operator: Okay. What's his middle initial?
Complainant: Martell. He's runnin' now.

Davis, 547 U.S. at 817-18.

ongoing emergency because the questions were asked in order to provide information to dispatched police officers regarding whether they would be encountering a violent felon. Davis, 547 U.S. at 827.

However, whether the assault is occurring at the time the complainant is making the 911 call is not dispositive of whether the statements are testimonial. Even where the assault is not presently ongoing at the time the 911 call is made, the complainant's statements are not testimonial if the 911 call is a request for help and for protection rather than merely a call made to aid future prosecution. Williams, 136 Wn. App. at 503-04 (statements were nontestimonial where complainant called to report assault against herself and her boyfriend by men who had fled and, while she insisted that the men be arrested, the majority of her statements demonstrated that her overriding purpose for calling 911 was to secure police assistance for the safety of herself and her children); Saunders, 132 Wn. App. at 602-03 (statements were nontestimonial where complainant called 911, crying and distressed, to report that her boyfriend had assaulted her and that she feared he would return); compare State v. Powers, 124 Wn. App. 92, 101-02, 99 P.3d 1262 (2004) (statements where testimonial where complainant's purpose in placing the 911 call was to report a completed crime, namely a violation of a court order, and she "described [the defendant] to assist in his apprehension and prosecution, rather than to protect herself or her child from his return").

Givens' 911 calls reveal that the primary purpose of her statements and the 911 operator's questions was to resolve an ongoing emergency. Givens' statements were not provided to prove past events for prosecution purposes. See Powers, 124 Wn. App. at 101-02. She hysterically describes to the 911 operator that she was assaulted only moments before, her assailant has driven away but she does not know where he is, she is currently bleeding, and her son has been left somewhere unknown. The circumstances of Givens' calls objectively indicate that the primary purpose was to enable police assistance to meet an ongoing emergency. While the crime had already occurred, Givens was calling to request assistance, not to specifically report that Johnson had violated the no-contact order or had assaulted her. "She simply was not acting as a *witness;* she was not *testifying*. What she said was not 'a weaker substitute for live testimony' at trial." Davis, 547 U.S. at 828 (quoting United States v. Inadi, 475 U.S. 387, 394, 106 S. Ct. 1121, 89 L. Ed. 2d. 390 (1986)). While Givens was not being assaulted while she was on the call, she was reporting an ongoing emergency, as were the complainants in Saunders and Williams. Her statements were not testimonial and their admission did not violate Johnson's Sixth Amendment right to confrontation.

However, a conversation that begins as an interrogation to determine the need for emergency assistance may evolve into testimonial statements once that purpose has been achieved. Davis, 547 U.S. at 828. The Supreme Court

speculated that, with respect to the Davis complainant's statements made after the defendant drove away and the emergency appeared to have ended, "[i]t could readily be maintained that, from that point on, [the complainant's] statements were testimonial." 547 U.S. at 828-29. To the extent certain statements in a 911 call are not concerned with seeking assistance and protection from peril, those statements could be deemed to be testimonial. State v. Davis, 154 Wn.2d 291, 304, 111 P.3d 844 (2005), aff'd sub nom. Davis v. Washington, 547 U.S. 813, 126 S. Ct. 2266, 165 L. Ed. 2d 224 (2006).

Trial courts "should redact or exclude the portions of any statement that have become testimonial." Davis, 547 U.S. at 829. Where this is not done, and testimonial statements are admitted, "[a] violation of the confrontation clause is also subject to harmless error analysis where the error was harmless beyond a reasonable doubt." State v. Davis, 154 Wn.2d at 304. Any error in the admission of testimonial statements is harmless if "the untainted evidence admitted is so overwhelming as to necessarily lead to a finding of guilt." State v. Davis, 154 Wn.2d at 305.

The trial court herein required that the State redact a small portion of the recording of Givens' 911 call because the operator had made statements that an independent witness had called to report the assault against Givens. The trial court did not redact any of Givens' other statements because it found that there was no testimonial intent in giving any of the statements. We agree that Givens'

statements were not testimonial and their admission did not violate the confrontation clause.[13]

V

Johnson also contends that Jelani's statements made in a 911 call were both hearsay and testimonial in violation of Johnson's right to confrontation. We disagree.

Hearsay is "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." ER 801(c). Hearsay evidence is inadmissible unless an exception applies. ER 802. ER 803(a)(1) provides one such exception for present sense impressions. A present sense impression is "[a] statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter." ER 803(a)(1). "The admissibility of a statement of a present sense impression is based upon the assumption that its contemporaneous nature precludes misrepresentation or conscious fabrication by the declarant." State v. Hieb, 39 Wn. App. 273, 278, 693 P.2d 145 (1984), overruled on other grounds, 107 Wn.2d 97, 727 P.2d 239

[13] To the extent that any of the statements Givens made could be considered testimonial, the admission of those statements was harmless. This is because the information essential to the prosecution of this case was Givens' identification of Johnson as her assailant. Davis, 154 Wn.2d at 304-05. Givens' statements identifying Johnson as her assailant were nontestimonial and their admission did not violate the confrontation clause. These statements were properly admitted, as were Jelani's statements, as discussed below. In addition, similar to the facts in Davis, the police officers arrived very shortly after Givens made her 911 call and they observed and documented her fresh injuries and testified to such. The certified copy of the existing no-contact order was also admitted. The untainted evidence was overwhelming, and any error in admitting testimonial statements from the 911 call was harmless and would not provide a basis for appellate relief.

(1986).

The trial court admitted a recording of Jelani's 911 call pursuant to the present sense impression exception to the hearsay rule. We review for an abuse of discretion a trial court's evidentiary rulings. State v. Lane, 125 Wn.2d 825, 831, 889 P.2d 929 (1995). A trial court abuses its discretion when its decision is manifestly unreasonable or based on untenable grounds. State v. Rohrich, 149 Wn.2d 647, 654, 71 P.3d 638 (2003).

The State established that Jelani contacted 911 immediately after he saw Johnson drive off with Givens and after Johnson had left Jelani stranded on the side of the road. Jelani's statements describing what had happened between Johnson and Givens were made within moments of his "perceiving the event." ER 803(a)(1). His statements described the events that he had perceived: he stated that a man just drove off with his mother, he explained the color and type of car that had just driven off with his mother, and he described the assault he had just witnessed. Others of Jelani's statements described where he was currently located and whose phone he was using. These were all present sense impressions of events that had occurred almost immediately before his phone call. The timing, nature, and content of Jelani's statements reveal that he did not misrepresent or consciously fabricate any of the statements. Thus, the trial court did not abuse its discretion when it admitted Jelani's statements as present sense impressions pursuant to ER 803(a)(1).

In addition, the trial court's admission of Jelani's statements did not violate Johnson's Sixth Amendment right to confrontation because these statements were not testimonial in nature. The circumstances of Jelani's 911 call reveal that his statements were made in an attempt to resolve an ongoing emergency. He was calling to report that his mother had just been assaulted and that Johnson had driven off with her in the car, leaving Jelani stranded somewhere unknown. He was calling to request assistance for his mother and to figure out what he should do to resolve his predicament.

The trial court properly admitted Jelani's nontestimonial, present sense impression statements.

VI

Johnson also contends that Givens' November 7 statement regarding her identity was inadmissible because it was testimonial in nature.[14] We disagree.

The trial court ruled that the statement was not hearsay because it was not being offered for the truth of the matter asserted. If a statement is not offered for the truth of the matter asserted, its admission cannot violate the confrontation clause, which "does not bar the use of testimonial statements for purposes other than establishing the truth of the matter asserted." Crawford,

[14] On appeal, Johnson asserts that this issue is being raised for the first time on appeal but that it constitutes a manifest error affecting a constitutional right that is reviewable for the first time on appeal. RAP 2.5(a). However, a review of the record reveals that in addition to his hearsay objection to Givens' statement of identity, Johnson also argued, to some extent, that the admission of the statement caused a potential confrontation clause violation. Therefore, this issue is not raised for the first time on appeal and we need not determine whether there was a manifest error affecting Johnson's constitutional right.

541 U.S. at 59-60 n.9 (citing Tennessee v. Street, 471 U.S. 409, 414, 105 S. Ct. 2078, 85 L. Ed. 2d. 425 (1985)).

Even assuming that Givens' statement of identity was inadmissible hearsay and was testimonial in nature, any error in admitting it was harmless beyond a reasonable doubt. As discussed above, a violation of the right to confrontation is subject to a harmless error analysis. Delaware v. Van Arsdall, 475 U.S. 673, 684, 106 S. Ct. 1431, 89 L. Ed. 2d. 674 (1986). There was unrebutted independent evidence in the record from which the jury could find proof of the necessary element that Givens was the person in the car with Johnson: Officer Ryan testified unequivocally that the person he arrested in the car with Johnson was the same person as depicted in the photograph of Tralenea Givens. Thus, the untainted evidence introduced at trial is overwhelming and necessarily leads to a finding of guilt beyond a reasonable doubt. Therefore, any error in the admission of Givens' statement of identity was harmless.

VII

Johnson also filed a statement of additional grounds, contending that the trial court erred in excluding mention of defense counsel's pretrial conversation with Givens wherein Givens purportedly stated that she was not present at either the September 15 or November 7 incidents. But this contention is without merit because Johnson did not request that the trial court allow reference to these

statements. Therefore, there is no trial court ruling for us to review. Nothing in this claim of error merits appellate relief.

VIII

The State presented adequate evidence that Johnson had at least two previous qualifying convictions, the charging document adequately apprised Johnson of his charged crimes, and the challenged statements were properly admitted. Accordingly, we affirm.

Dwyer, C. J.

We concur:

Ellington, J.

Grosse, J.